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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Second interim report on the question of the impunity of perpetrators of human rights violations, prepared by Mr. El Hadji Guissé, Special Rapporteur

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Origin and purpose of the study

1. In resolution 1991/10, adopted at its forty-third session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities requested Mr. El Hadji Guissé and Mr. Louis Joinet to draft a working paper examining in depth the question of the impunity of perpetrators of violations of human rights.

2. The working paper (E/CN.4/Sub.2/1992/18) was submitted to the Sub-Commission at its forty-fourth session. It includes a preliminary analysis of the legal mechanisms and the practices that facilitate impunity and proposes guidelines for the consideration of anti-impunity measures.

3. In its resolution 1992/23, the Sub-Commission decided to request Mr. Guissé and Mr. Louis Joinet to draft a study on the impunity of perpetrators of violations of human rights and to propose measures to combat that practice. The Commission on Human Rights, in its resolution 1993/43, endorsed the Sub-Commission's decision and the Economic and Social Council, by its decision 1993/266, approved the Commission's action.

4. In paragraph 4 of resolution 1992/23, the Sub-Commission also invited Governments, the competent United Nations bodies, the specialized agencies, international and regional intergovernmental organizations and non-governmental organizations to provide information on the question. In a note verbale by the Secretary-General of the United Nations dated 10 December 1992, replies were requested by not later than 15 May 1993. Finally, in paragraph 5 of the resolution, the Sub-Commission decided to consider the preliminary report at its forty-fifth session.

5. In its resolution 1994/34, the Sub-Commission decided, in order to facilitate the treatment of the question in the light of communication difficulties, to entrust Mr. Joinet with the completion of the first aspect, concerning civil and political rights, and Mr. Guissé with the second aspect, concerning economic, social and cultural rights, and requested the Special Rapporteurs to submit their respective reports at its forty-seventh session.

6. In view of the importance of the interests involved and the questions to which it gives rise, this report on economic, social and cultural rights is a second interim report. It is designed to supplement the earlier one and to include the suggestions made by some members of the Sub-Commission, as well as by individuals and non-governmental organizations concerned with the subject, who have given me invaluable support.

7. As for its purpose, the study focuses upon economic, social and cultural rights and all current or recent violations thereof and of so-called collective rights such as the right to development and the right to a healthy environment, irrespective of their perpetrators, whether States or their agents, groups of States, national or international private organizations or individuals or groups acting outside the competence of the State. It should, however, be noted that, if a State tolerates in its territory or in territory that it is occupying by force acts by individuals constituting violations, it bears the responsibility and must prevent their impunity.

8. The study also endeavours, by an in-depth investigation, to identify the victims or their representatives and to quantify, as far as possible, the harm done to them. Lastly, it includes suggestions and recommendations for the prevention of any such violations.

Introduction

9. The first concept of human rights is a political one: it comprises respect by the State for the rights and freedoms of the human person. This concept prohibits State intervention in the area of individual rights and freedoms. These so-called traditional rights derive from an individualistic approach. They set their beneficiaries against the State. While these rights were being codified, a second category of rights made its appearance, i.e. economic, social and cultural rights, which no longer sets individuals against the State but makes them allies to achieve the rights in question. Whereas, in the case of civil and political rights, the State must stand aside so as to allow the individual to exercise them without interference, economic, social and cultural rights require the State to act and give the individual the material support needed to enjoy them.

10. This characteristic, which arises from the modes of implementation, in no way impairs the indivisibility of human rights as affirmed by several international instruments. The preamble common to the two International Covenants on Human Rights recognizes that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. The 1968 Proclamation of Tehran reaffirmed that human rights and fundamental freedoms were indivisible. In the context of that interdependence, the realization of economic, social and cultural rights was of crucial importance for the effective exercise of civil and political rights.

11. The General Assembly of the United Nations has also stated that equal attention and urgent consideration should be devoted to the realization, promotion and protection of both civil and political rights and economic, social and cultural rights. The concept of human rights thus becomes a politico-economic one, encompassing at once the security and protection of the individual and his material and moral well-being.

12. Human rights constitute an indivisible whole reflecting the unity and uniqueness of the human being. Despite the indivisibility of the various categories of human rights, some economists and jurists, according to their training or their country's level of development, give a greater priority to one category or another.

13. In its resolution 4 (XXXIII) of 21 February 1977, the Commission on Human Rights stresses the responsibility and duty of all members of the international community to create the necessary conditions for the full realization of economic, social and cultural rights as an essential means of ensuring the real and meaningful enjoyment of civil and political rights and fundamental freedoms. It calls upon all States to take prompt and effective measures, both on the national and on the international level, to remove all

obstacles to the full realization of economic, social and cultural rights and to promote all actions that will secure the enjoyment of the said rights.

14. Certain States, particularly developing ones, have stressed the difficulties that can arise when attempts are made to reconcile the objectives of planned material development and the protection of human rights. Some of them have, moreover, stated that they attach high priority to economic and material development and strengthening their institutions.

15. This interdependence of civil and political rights on the one hand and economic, social and cultural rights on the other confirms their identical legal basis, even if each category of rights has its own implementation rules.

16. The special nature of economic, social and cultural rights was very clearly expressed during the discussion of methods of implementing them. The Secretary-General of the United Nations noted, with respect to these rights, that it might take time effectively to transform them into rights directly enforceable and sanctioned by law. In other words, these rights might in due course be given a concrete form that could be invoked in a court of law. In that event, the violation of such rights, whoever the perpetrator, should not and cannot go unpunished.

17. During the discussions on methods of implementing economic, social and cultural rights, an implementation that necessitates a certain level of economic development and material support, the representatives of several developing countries expressed the fear that the inevitably slow progress in realizing those rights might be taken for unwillingness on their part. They had not reckoned with the developed countries' determination to undermine any possible basis for a fair world economic order where economic, social and cultural rights would have a chance of being realized. Very soon afterwards, the fears of the former and the hypocrisy of the latter became a source of serious and gross violations of economic, social and cultural rights and of collective rights such as the right to development and the right to a healthy environment.

18. The General Assembly has emphasized the need and the urgency to ensure, both nationally and internationally, that progress is made in the area of human rights. It stressed this point in the Declaration on Social Progress and Development, article 2 of which states that "Social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice".

19. Article 22 of the Universal Declaration of Human Rights specifies that "Everyone ... is entitled to realization, through national effort and international cooperation ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". Further to the reference to international cooperation, the International Covenant on Economic, Social and Cultural Rights provides in article 2, paragraph 1, that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant".

20. The commitment thus made is a guarantee for the legal protection of these rights. It is true that many studies have been made of economic, social and cultural rights and of collective rights such as the right to development and the right to a healthy environment from the point of view of their history, basis, regulation or scope, but there have been very few on ways of combating violations of them. Any serious study of the kind will be concerned with giving these rights a definite legal value, the basis for which exists in the numerous relevant international human rights instruments.

21. Before listing these instruments and in response to requests by some representatives of States or non-governmental organizations, I think it important to outline a definition of the impunity which is the subject of this report. Impunity can be understood as the absence or inadequacy of penalties and/or compensation for serious and large-scale violations of the human rights of individuals or groups of individuals. This definition is applicable to civil and political rights, as well as economic, social and cultural rights, and also to so-called collective rights.

22. To be complete and effective, the campaign against impunity must be preceded by a serious and thorough investigation to bring to light the factual sources of the violations and identify the perpetrators and the victims so that the damage done can be appropriately remedied.

23. The campaign against impunity should focus on the absence of penalties or compensation and the inadequacy of penalties or compensation already in existence or contemplated. The obligation to protect and promote all human rights includes that to punish and compensate the harm and damage which result from their violation.

24. Numerous international legal instruments incorporate the principle of combating impunity with regard to the violations of economic, social and cultural rights and the right to development. It should be noted that, although the legal framework for the right to a healthy environment is still lacking, that does not prevent it from being included in the existing legal framework.

25. The most important instruments include, in particular:

(a) The Charter of the United Nations, the Preamble to which states that the peoples of the United Nations are determined "to reaffirm faith in fundamental human rights" and "to promote social progress and better standards of life in larger freedom". Article 1, paragraph 3, states that one of the Purposes of the United Nations is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 55 adds "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

26. These ideas have been taken up and developed by other international instruments adopted by the United Nations and by the specialized agencies affiliated to it, including:

(a) The International Covenant on Economic, Social and Cultural Rights which, in its article 2, provides that "Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". This commitment means that the State must both ensure effective enjoyment of these rights and establish the legal framework rendering it possible to protect them and punish their violation;

(b) The Proclamation of Tehran of 1968, by which the international community reaffirmed its determination to put an end to gross denials of human rights and to intensify efforts and initiatives at the national and international levels in the area of human rights. The International Conference on Human Rights at Tehran had been the opportunity to review the progress made in protecting human rights since the adoption of the Universal Declaration of Human Rights, to assess the effectiveness of the methods and techniques used and to identify the main obstacles encountered in the area;

(c) The Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S-VI));

(d) The Programme of Action on the Establishment of a New International Economic Order (General Assembly resolution 3202 (S-VI));

(e) The Declaration on Social Progress and Development (General Assembly resolution 2542 (XXIV));

(f) The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV));

(g) The Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX));

(h) General Assembly resolution 3362 (S-VII) on development and international economic cooperation;

(i) The Philadelphia Declaration of 1944, part of the Constitution of the International Labour Organization (ILO);

(j) The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977, adopted by the Governing Body of the International Labour Organization. Article 4 of the Declaration states that the principles set out in the Declaration are commended to Governments, employers' and workers' organizations and the multinational enterprises themselves. Article 8 stipulates that all the parties concerned by the Declaration should respect the Universal Declaration of Human Rights and the International Covenants;

(k) The Declaration on the Right to Development of 1986 (General Assembly resolution 41/128); and

(l) The Vienna Declaration and Programme of Action of 1993.

27. Regional conventions and declarations take closer account of the special characteristics of the peoples they govern. Consequently, they are in no way opposed to the provisions of the universal instruments but are complementary to them. The two sets of instruments constitute an important legal machinery for the more effective protection and promotion of all human rights. The following instruments at the regional level may be mentioned:

(a) The African Charter on Human and Peoples' Rights, articles 20, 21 and 22;

(b) The European Social Charter; and

(c) The Protocol of Amendment to the Charter of the Organization of American States of 1985 and the 1988 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.

28. These instruments and many more unequivocally lay down the obligation of individuals, groups of persons, States and the international community to combat impunity for those who violate economic, social and cultural rights. In certain States, where the promotion and protection of human rights is a Government concern, appropriate legislation has been drafted to punish any human rights violations over and above the incorporation into domestic law of the international legal standards in order to make it possible for national legal, administrative or economic authorities to apply them.

29. This study is focused on two points:

(a) The mechanisms of violations and their consequences for economic, social and cultural rights. Some of these mechanisms now belong to history, but they have nevertheless left entire peoples in complete destitution without any reparation. Other more topical mechanisms are the cause of serious violations of economic, social and cultural rights; and

(b) The actual campaign against impunity; the organization of the campaign in terms first of preventive measures and then of jurisdictional ones.

I. SOME MECHANISMS OF VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

30. The events and acts that lead to the violations of economic, social and cultural rights can be of any kind. They are neither identifiable in advance nor necessarily known at all. They may be related to historical events that have been consigned to the past or of current significance. They may affect individual or collective rights. The list that follows is therefore not exhaustive but consists of cases chosen because of their extreme seriousness or frequency. When they relate to historical events, they are of interest for

this study only to the extent that they have had, and continue to have, serious and very negative effects on the enjoyment of the economic, social and cultural rights of individuals and peoples. The serious violations which resulted from them have remained unpunished and there has been no reparation for them. The best known of them are essentially slavery, colonization, apartheid and the looting of the cultural heritage of the third world.

31. The violations listed above are international and concern several countries because either their perpetrators - States or their nationals - or their victims are individuals or peoples from several countries. They are large-scale actions that often lasted for many years. Their commission in time and in space constitutes international offences which come within universal jurisdiction and are imprescriptible. Whereas, according to the law in force in most countries, prosecutions and the imposition of penalties become extinguished by the expiry of a period of time fixed by the law, crimes under international law are considered to be imprescriptible, i.e. however much time has elapsed since their commission, it will always be possible to prosecute and punish their perpetrators and to repair the damage caused. This principle is strengthened by that of universal jurisdiction, which means that an international crime comes within the jurisdiction of all States.

32. Impunity for violations of basic rights compromises the international obligation of States to guarantee these rights and to punish a failure to respect them. What is the point of proclaiming rights if they can be violated with impunity and disregarded? In this connection, it should be remembered that the efficacy of the international system for protecting the human rights of the individual is based on the right to an effective remedy. The various mechanisms which produce impunity make this right completely inoperative. This denial of justice occurs in the first place at the domestic level but also at the international level since it closes all access by individuals to the international human rights bodies.

33. Contemporary violations of economic, social and cultural rights are national or international. The following are examples of international mechanisms that give rise to serious violations of economic, social and cultural rights: debt, structural adjustment programmes, deterioration of terms of trade, corruption, laundering of drug money, the fraudulent activities of transnational corporations, etc. Violations committed on national territory, most of which are considered to be justiciable offences, include: misappropriation of public funds, misuse of company assets, corruption, tax and customs evasion, financial speculation, fraudulent or unlawful enrichment, exploitation of illegal labour and migrant workers, etc. Such a legal definition would make it possible to combat the impunity of the perpetrators of violations. This impunity in respect of the crimes against humanity constituted by violations of economic, social and cultural rights, of basic rights and of the right to development, is a major and systematic impediment to the effective enjoyment and full application of human rights throughout the world.

A. Historical background

34. The Special Rapporteur saw fit to refer to these violations because they are still having a negative effect on the economic rights of entire peoples.

From the point of view of international law, these violations should be regarded as crimes against humanity and, consequently, not subject to a statute of limitations and coming under universal jurisdiction.

35. According to international law, and more particularly that elaborated since the judgement of the Nürnberg Tribunal and in the work of the International Law Commission, crimes against humanity also include gross actions against any civilian population, whether in the context of an armed conflict or outside it. Impunity for these crimes prevents every human being from living in a world based on justice, peace, freedom and democracy.

36. International unlawful actions engaging the responsibility of a State towards other States or the international community as a whole constitute what is termed a State crime. This crime, according to the International Law Commission, can result from a serious and large-scale violation of an international obligation that is of essential importance for the protection of the human being, such as those prohibiting slavery, genocide or apartheid. The actions engaging the international responsibility of a State are the same as those giving rise to individual criminal liability in the case of persons who, whether as groups or as private individuals, commit actions constituting an offence. According to the preamble to the Hague Convention of 18 October 1907 - approved in France by the Act of 25 May 1910, populations remain under the protection and the rule of the principles of the law of nations, as they result inter alia from the laws of humanity and the dictates of the public conscience. The duty of prosecuting and punishing crimes under international law rests primarily with the State on the territory of which the crimes were committed and/or in which the perpetrators can be apprehended.

37. It arises from this concept that the obligation to make redress rests on individuals, on States and on the entire international community. It is for the State and the international community to organize the political and legal framework needed to undertake, with any chance of success, the campaign against impunity for violations of economic, social or cultural rights, whether individual or collective. A consideration today of the historical violations of these rights leaves no room for doubt that this campaign requires cooperation between the State and the international community.

38. Among the historical cases of relevance to this study, mention may be made of: slavery, colonization, apartheid and the cultural looting of the third world.

1. Slavery

39. Slavery was not a new phenomenon in the fourteenth century. It had been practised by other civilizations on other peoples. However, the large-scale and systematic way in which it was applied in Africa, on African peoples, was out of all proportion. Carried out in the most inhuman ways, it was more costly in human lives, more destructive of the social fabric and the source of greater economic and cultural looting than mankind had every known. It was systematized and generalized to the point of being called the "black-slave trade".

40. The long and painful period during which the slave trade flourished was indeed begun by individuals but was subsequently shamelessly developed by companies and ultimately organized and directed by States, all of them European. For centuries, millions of men, women and children were torn from their society and taken forcibly to the Americas to be treated there in the most inhuman and degrading manner. Some of these people, after incredible sufferings, perished during the ocean crossings. African history in the period of slavery is marked by a series of crimes and violations of the rights of the human person which are beginning to be recognized but which have never formed the subject of any redress, while the Powers formerly responsible for this traffic continue to profit from it with impunity. Historically speaking, this exploitation is characteristic of the impunity for the serious violations of the rights of the peoples that suffered them.

41. It should in fact be added that the African peoples were not the only victims of slavery. The indigenous peoples of the New World were dispossessed of all their lands, the exploitation of which necessitated a costless labour force, which slavery supplied for its practitioners. The dual genocide committed, both upstream and downstream of slavery, has remained unpunished.

42. Slavery left Africa in a state of economic and cultural ruin and social ravages from which it has never recovered. The scope of this report is too narrow for a detailed description of the numerous serious violations of rights of all kinds, whether civil and political or economic, social or cultural and considered either collectively or individually.

43. The international community and the States involved have recognized the harm done to the victim peoples and apologies to Africa, even by the sovereign pontiff, are not sufficient to erase the odious crime and undo its consequences of dire poverty, underdevelopment, destitution, disease and ignorance. These violations must be taken into account, although any prospect of decent redress requires a definite will and political courage.

44. Slavery is also the looting of the wealth and resources of the victim countries and, when such an exploitation went on for centuries, it is undeniable that the harm caused is huge and difficult, if not impossible, to quantify even if its reality is undoubted despite the time that has elapsed.

2. Colonization

45. When the international community became aware of the seriousness and extent of the calamity of slavery, it undertook to abolish it but opened the door to another form of exploitation and domination: colonization. The slaving Powers turned into colonial Powers. As in the previous system, the conflicts that preceded and accompanied colonial conquests were brutal and inhuman. Professor Mohamed Bedjaoui has defined colonization as a social, economic and political act. It expresses itself in the legal relationships of domination and exploitation. From the point of view of international law, it is an attempt to establish a relationship of subordination between two nations in every sphere.

46. In its implementation, colonization pursued the destruction and modification of the structures of the colonized peoples. The models of

civilization and development imposed served only to deepen and worsen the work of destruction undertaken by the colonizers, who were not interested in helping the colonized peoples to escape from their ignorance. The international community, through its deliberative body of the period - the General Assembly of the League of Nations - which was dominated by the Western countries, had authorized those countries to divide up the third world and dispossess the colonized peoples of their lands and possessions.

47. The system of slavery combined with that of colonization ended up by ruining the entire third world which, moreover, has never recovered. For centuries, the colonial Powers, which are easily identifiable today, pillaged the wealth of the colonized countries to the profit of and on behalf of their nationals and to ensure their own economic and social development. The colonized peoples and countries, worn out and ruined as they were, finally took up arms to free themselves at the cost of enormous sacrifices. The neo-colonization which followed the earlier system has perpetuated the domination and exploitation of the countries caught up in the machinery of the system.

48. The decolonization movement, after the severing of the bonds of domination and exploitation, posed the problem of the relationships between the former colonies and the colonizer in terms of development, equality and restitution of wealth which, of course, encountered the resistance of the debtor countries. This gave rise to the saying that one of the prerequisites for decolonization was maintenance of the existing status quo.

49. One of the most important factors in maintaining that situation is the cooperation provided by the former colonial Powers, which uses a series of constraints to impose its will on the former colony, now a "sovereign State" but actually without means or power. In this unequal relationship between assisted and assister, the latter imposes its will and thus maintains the general orientation of existing or new structures in the economic, social and cultural spheres. Whatever form decolonization took, whether violent or negotiated, it has led everywhere to the same disastrous result of dependence and exploitation, maintaining an unjust world economic order which the developing countries, composed essentially of former colonies, insist should be revised to achieve a fairer balance.

3. Apartheid

50. A tragic vestige of colonial domination, apartheid in many ways recalls slavery. The system meant, in economic terms, complete and effective enjoyment by a white minority of all the wealth and natural resources of a people dominated and excluded on racial grounds. It was erected into a system of government and applied for about a century accompanied by violations of human rights, both economic, social and cultural rights and civil and political rights. These gross and large-scale violations have never been remedied in any way, although they have been characterized in their aggregate as crimes against humanity and thus not subject to any statute of limitations.

51. From the time of the first Dutch colony, the "whites" gradually extended their domination over the whole of South Africa. This trend intensified with the arrival of the British and other "white" population groups which, by

violence or cunning, appropriated nearly all the agricultural and residential lands in South African territory. The "whites", who represented 20 per cent of the population, had control over and use of 80 per cent of the territory, whereas the "blacks", who represented 70 per cent of the population, controlled only 13 per cent of the lands. As stated above, this situation, maintained at the expense of the blacks, lasted for more than a century. That system was not peculiar to South Africa only. What is today Namibia was governed for a very long time by the same process consisting of a black majority dominated by a white minority. Even today, survivals of the system continue to produce victims.

4. The cultural looting of the third world

52. At the same time as the dominated peoples and countries were being abominably exploited, their cultural heritages were being looted. Nowadays, cultural goods which belonged to these people and countries are easily to be found in the museums of the Western world, without any quid pro quo, of course. This cultural looting of the third world by the former colonial Powers is continuing through a traffic knowingly organized by them. They are acting thus in contempt of the laws of the countries concerned and of the international standards worked out by the international community to which they have freely acceded.

53. For the victim peoples and countries, slavery, colonization, apartheid and the cultural looting of the third world were frameworks for gross and systematic violations of human rights and for a total disregard of their right to development. These serious violations have never been redressed and deprive the victims of any possibility of developing themselves and leading a decent life.

54. The mechanisms listed above belong to the past but have baneful consequences for the economic life of the victims. Today, these peoples are living in a state of dire poverty, as frequently noted by the international community. The serious crimes of large-scale violations of human rights produced by these systems are ongoing ones. The principle in such cases is that, so long as the nefarious action has not ceased, there can be no prescription, the more so as these are crimes against humanity which are thus imprescriptible and subject to the principle of universal jurisdiction. This principle makes it possible for the courts in all countries to take cognizance of an act constituting a crime against humanity.

B. Present practices and procedures which are sources of violations of economic, social and cultural rights, the right to development and the right to a healthy environment

55. These practices and procedures, which are sources of violations of the economic rights of individuals or groups in all societies, cannot be exhaustively listed because of their commonplace nature. Those listed are perhaps the most usual, but they are not the only ones. They can also, in some cases, involve several countries simultaneously and several population strata. The countries affected are not necessarily the developing ones. The economies and peoples of the developed countries also suffer from them. In

the latter case, the damage takes the form of a high rate of unemployment accompanied by an intense social crisis. The following practices and procedures may be mentioned:

1. Debt

56. It is urgent and absolutely essential to understand the catastrophic and intolerable predicament of the developing countries carrying a heavy burden of debt which prevents any economic improvement. The result of several pernicious systems of exploitation, indebtedness necessitates multifarious solutions, political and/or legal, pragmatic or planned. Debt and debt-servicing are steadily impoverishing the peoples concerned more and more every day. Debt-servicing and debt repayment should never prevent the peoples of the debtor countries from exercising their basic rights.

57. The Lester Pearson Commission had already estimated that, by 1977, debt-servicing, i.e. annual repayment of principle and payment of interest, would alone exceed the gross amount of new lending by 20 per cent in Africa and 30 per cent in Latin America. In other words, the new loans which a developing country felt obliged to enter into for development purposes could not be used for development and would not even be enough to cover the servicing of existing debt. Developing countries will in future have regularly to take on new debt, not for investment, but for repayment.

58. In this way, debt which increases as it is repaid becomes a further bond of dependency. For many countries, it is an intolerable burden. This situation has led to debt crises in almost every developing country, necessitating alleviation or renegotiation of their debt without any lasting solutions being found. These debt crises give rise to economic and social crises which often culminate in very serious social disturbances, leading to political instability that often prevents any economic development. The debt crises of the 1980s caused the debtor countries to accept Draconian conditions for the reorganization of their economies. They had then not only to export more to repay their debt but also to restructure their economies according to neo-liberalist principles, i.e. to deregulate economic activity, privatize public companies and greatly reduce State expenditure.

59. While public debt is increasing steadily at a rapid rate, with the grave consequences described, official aid to the developing countries is declining. The "developed" countries, which perpetuate this situation, and the international institutions (World Bank and International Monetary Fund) which act as their collection agencies, should revise their policies so as to ensure an international transfer of resources to the developing countries, sufficient to spare them the difficulties caused by indebtedness. The primary mission of the international financial institutions is precisely that of assisting such transfers.

60. It will be recalled that, in 1944, the Bretton Woods Conference decided to set up the World Bank and International Monetary Fund (IMF) for the purpose of helping to improve world trade relations. Article 1 of the IMF Articles of Agreement sets out six objectives for the Fund, one of them being to facilitate the expansion and balanced growth of international trade and to contribute thereby to the promotion and maintenance of high levels of

employment and real income and to the development of productive resources. IMF recommendations and guidelines, which are especially hard on countries wishing to renegotiate their debts, are in flagrant contradiction with the aims set out in article 1 of its statutes. It is worth noting that the loans granted to developing countries have actually been merely a series of fictitious operations bringing no benefit to the populations concerned, which are nevertheless called on to repay them. The loans granted in fact take different directions, none of which leads to the really needy segments of the population. They are partly used to service debt and partly misappropriated by those responsible for managing them, to be redeposited in the banks of the creditor countries or reinvested in companies in those same countries.

61. The main consequences of such practices are to multiply and exacerbate the problems of the developing countries. The main victims are, of course, the deprived segments of society who have less to live on, and nothing seems able to halt their slide towards absolute poverty. It appears that perpetuating the debt of the developing countries is the result of a deliberate political decision designed solely to frustrate any attempt by the developing countries and their peoples to achieve economic and social progress.

62. It is certain that international financial imbalances strike directly at the already frail economies of the developing countries. Such imbalances will continue to worsen as long as world economic structures are marked by unequal terms of trade. Moreover, there is also every indication that the perpetuation of indebtedness means that it can be used as a powerful weapon to bring developing countries to their knees, while providing their governing classes with the means to cushion themselves and advocate an economic policy which is catastrophic for the vast majority of the world's poor.

63. Taking exclusively into account the situation of the sub-Saharan African countries, the Secretary-General of the United Nations launched, on 15 March 1996, a seemingly unprecedented programme to mobilize all the agencies of the United Nations system and funds in an amount of $25 billion to put the economies of these countries back on their feet. The resources will not be new ones but rather a reorientation of resources already existing at the national and international levels. The international financial institutions are considering a series of measures to lighten the burden on the most heavily indebted countries. According to the World Bank, it is impossible to break the vicious debt circle with the existing financial instruments and new ones will have to be created. The Bank proposes, in the first instance, to establish a ceiling for debt-servicing which should not exceed 20 to 25 per cent of the export earnings of the country concerned. As for the debt itself, its weight must not be greater than two and a half times the value of exports. In practice, these alleviating mechanisms would intervene only as a last resort, once all the current and conventional remedies had been exhausted. In view of the fact that the multilateral debt cannot be rescheduled, still less cancelled, the measures proposed seem to be simple stopgap devices designed to ensure repayment of the debt. We all remember the promises made in the context of the structural adjustment programmes which very rapidly turned into a resounding failure in all the countries that applied them.

64. The manner in which the debt is managed at present also enables transnational corporations to frustrate any attempt by the developing countries to assert their sovereignty or chart the course of their own development. Debt is a formidable instrument for domination which the transnational corporations wield effectively against the developing countries. Reference must once again be made to the failure of the Bretton Woods institutions to carry out their primary mission. This failure, combined with the activities of the transnational corporations and the selfishness of the developed countries, has led to the establishment of two harmful and destructive practices in the form of structural adjustment programmes and, more recently, devaluation of the currencies of the developing countries.

2. Structural adjustment programmes

65. The national economies of States are dependent on the current framework of the world economy and this makes cooperation between States increasingly important, and heightens the responsibility of agents and partners in development in connection with structural adjustment programmes which, it should be recalled, are merely techniques or ways of managing shortages with the declared purpose of bringing debt under control. This attempt at debt control has so far been a failure as blatant as it is significant. These structural adjustment programmes have inflicted enormous inhuman and counter-productive suffering on the deprived populations of the debtor countries. These methods of managing shortages which steadily worsen the state of dire poverty of the peoples concerned were imposed by the debtor countries with the complicity of the international financial institutions in a fictitious context of negotiation in which the creditors had the power to lay down the law.

66. In a new approach to its social policy, the International Labour Organization (ILO) is doing everything possible to alleviate social deprivation, not only by creating safety nets but also by taking preventive action in the form of establishing a more intensive dialogue with a view to influencing the Bretton Woods institutions. On 21 June 1993, the International Labour Conference reaffirmed this approach by adopting the resolution entitled "Resolution concerning social protection and the alleviation of unemployment and poverty, and the social dimension of structural adjustment and transition to a market economy". The ILO spirit thus differs completely from the attitude of the Bretton Woods institutions as if they did not belong to the same United Nations system. This lack of harmony demonstrates, if need there still be, the deviation of the financial institutions from their primary mission.

67. Structural adjustment programmes impose a heavy burden on workers and their families and on other vulnerable groups such as women, children, the unemployed, the jobless and the handicapped. They imperil public spending on education, health and collective social services. Wage levels fall and job losses are frequent. In short, no economic, social or cultural human right is observed or protected. The measures adopted in the context of structural adjustment programmes can, as they develop, culminate in a downturn in exchange rates which reduces the purchasing power of the workers and causes inflation which is intolerable for the less favoured segments of the population.

68. Bringing about drastic cuts in the budget provisions of the States concerned, structural adjustment programmes prevent them from meeting their social and general welfare obligations to their peoples. Structural adjustment programmes have merely worsened the state of economic ruin of the underdeveloped countries of the third world. They are nothing more than means of distraint designed to recover the sums owed to the wealthy countries without any concern for the difficulties of the debtor countries.

69. Downturns in exchange rates or currency devaluations have considerably weakened the economies of the third-world countries. Quite apart from the economic power of the State, the multiplier effects of such monetary policies damage the investment possibilities of private companies and individuals; they are sources of inflation and of uncontrollable surges in prices. Companies then downsize and lay off workers with a clear reduction in income. Devaluation leads to a change in the relative prices of imports, which become dearer in the national currency, and exports, which become cheaper in foreign currencies. In view of the fact that the developing countries are already suffering from the deterioration in the terms of trade, a fall in exchange rates cannot but be disastrous for their economies.

3. Embargo

70. In order to destroy certain political regimes considered to be totalitarian and not respecting the rights of the human person, the international community may adopt measures designed to punish the States concerned. It then seeks, by a concerted action, to isolate them politically, economically and commercially. A State thus targeted can neither import nor export products needed for its development and the material welfare of its people. The embargo thus decided upon can be total and comprise everything that a country might need (foodstuffs, medicines, construction materials, school supplies, military equipment, etc.) or else partial and relate only to certain supplies such as military ones.

71. In both cases, the resulting privations, aimed at overthrowing the leaders, have a serious impact on the civilian population and particularly on vulnerable groups. This seems to be the case in Iraq, where hundreds of thousands of children have died as a result of the total embargo imposed on their country after the Gulf War. The same is true of Cuba. It has been noted that, in actual fact, only the civilian population has suffered from the measures adopted in the framework of the embargo in question. The expected effectiveness has never been achieved. Further thought should thus be given to the steps to be taken to save civilian populations from dictators.

72. However, in no case should a people be deprived of medicine and food and vulnerable groups should, in accordance with the spirit of the international instruments governing the international institutions, be given the fullest and most appropriate assistance in case of need. For the international community to be guilty of large-scale violations of collective and individual economic rights would be an utter aberration and the greatest contradiction developed within the United Nations system.

4. Corruption

73. The word "corruption" means the abuse of public trust for private purposes. It is a moral phenomenon, even though money is involved in most cases. A public office is used for the benefit of one or more individuals, rather than in the national interest. Corruption may exist independently of any financial benefit; it is universal and multiform. According to Professor Robert Klitgaard of Harvard University, there are several definitions of corruption in existence but it can be said that corruption means the abuse of an office for personal ends. This office may be public or private but corruption is usually regarded as a public phenomenon. An individual abuses the public confidence placed in him to serve his own interests or those of the group to which he belongs. To understand the many forms of corruption, it is first necessary to consider the nature of the situations and persons concerned: civil servants, businessmen, private individuals or companies using the same processes. The external factor intervening in the decision-making process influences the unwarranted benefit to the decision maker or executive in the form of a gratuity or the promise of a gratuity.

74. The Interregional Seminar on Corruption in Government, held under the auspices of the United Nations at The Hague from 11 to 15 December 1989, in cooperation with the Department of Technical Cooperation for Development, identified impunity as an underlying element of the various forms of corruption. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Havana from 27 August to 7 September 1990, noted in its resolution 7 on corruption in Government that that form of corruption was universal and that it had deleterious effects on the economies of all countries, but particularly those of the developing countries. Nowadays, this corruption is developing on a world scale. At the international level, it is harmful to the economies of the countries individually affected and, moreover, amplifies the imbalances caused by the world economic order as a whole.

75. In its resolution 1992/50 on the fraudulent or unlawful enrichment of top State officials, the Commission on Human Rights pointed clearly to the responsibility of the North in connection with the commission of that crime in the countries of the South and thus raised the question, still unclear in international law, of the restitution to despoiled peoples, for reinvestment in local economic, social and cultural development, of the funds which their leaders have extorted from them, usually with the complicity of foreign banks. The existence of highly developed capital markets encourages certain offences such as insider offences. The same is true in the countries with economies in transition. The headlong privatization taking place is accompanied by similar phenomena.

76. Corruption affects all sectors of public and private economic life. The existence of a public sphere and a private sphere is a prerequisite for corruption, but certain differences can be observed in the interests pursued. A businessman, working within the law, who slips an inducement across the table is generally pursuing an end corresponding to the interests of his company. The act - though reprehensible - thus comes within the framework of what constitutes the normal operation of the enterprise. This is also the

case of the politician who, in his own interest or in that of his party, tries to cover up a financial scandal but cannot do so without the help of other persons whose action or inaction he purchases. Another area very propitious to corruption is nepotism. This is a phenomenon extremely difficult to pin down but, since the criterion of competence has been replaced by that of favouritism, it creates between the decision maker and the beneficiary of the decision a link of dependency which may well influence future decisions.

77. The corrupted and the corrupter are not accomplices: each is the perpetrator of a distinct offence, subject to its own procedures and punishments. Moreover, corruption must be distinguished from the traffic of influence that one individual exercises over others to persuade them to refrain from carrying out one of their duties so as to give him an undue advantage. Both the corrupter and the corrupted can be civil servants, State agents, private individuals or elected officials. Corruption creates a dual responsibility. The corrupted (the passive subject) is just as responsible as the corrupter (the active subject). This dual responsibility gives rise to the fact that both parties are liable to punishment. Corruption can also engage the responsibility of the State if the latter is organizing it through the operation of its organs or when, by a permissive attitude, it accepts the fact that private entities or private individuals are practising it. In the case of an occupied territory, the occupying Power is responsible according to the provisions of the Geneva Conventions.

78. The internal corruption described above can have several connections in other countries and become transboundary. It then becomes the act of private companies or individuals. Corruption, whatever its perpetrator and its extent, constitutes economically speaking a serious obstacle to the economic and social development of the countries concerned. Thus, poisoning as it does the economy and the social fabric, corruption violates the economic, social and cultural rights as well as the right to development and to a healthy environment of the peoples and population sectors concerned.

79. Corruption is a phenomenon which has developed in time and in space. José Arthur Rios wrote: "Corruption is the product of inverted ethics, in that the act of corrupting involves the idea of reciprocity, which is actually an element of equity and justice". In a modern society, this rule of reciprocity results in corruption when it involves transactions which subordinate the management of public resources to the interests of the private sector. In primitive societies, the practice of gift-giving establishes a web of obligations between the groups. This network is functional and legitimate in such societies and in theory raises no question of corruption. Gift-giving can become an instrument enabling some individuals to impose their will on those who are unable to reciprocate. This latter group may be working for the private sphere at the expense of the public sphere or the general interest. In the context of this study, we must avoid lumping together minor forms of corruption (e.g. of public officials) and major forms which are sources of large-scale violations of human rights.

80. The advent of modern society based on mercantilism and the cash economy has endowed money with three separate functions which often make it the catalyst for the phenomenon of corruption, since money:

(a) Can be transferred unobtrusively from one person to another;

(b) Can be used for any transactions by virtue of its abstract nature; and

(c) Nullifies the effect of distance by permitting remote transactions.

81. As noted earlier, corruption is universal, but it should be added that it was introduced and developed in the third world mainly by the former colonial Powers. Nowadays, all States, whether developed or developing, suffer from the same phenomenon to varying degrees. Corruption is thus a functional phenomenon operating at all levels and in all spheres of activity. It has been rightly pointed out that corruption cannot thrive in a pluralistic and democratic society. The campaign against corruption must not spare anyone, irrespective of rank, origin or social function.

82. Corruption, trafficking in influence and breach of trust by officials are offences generally connected and usually carried out in the same context and by means of the same methods. These offences differ from the other economic offences in that the victim freely participates in full awareness of the harm being done to him but attracted by the gain. Organized and applied on a large scale, these offences cause immeasurable damage to larger and larger social strata. In the third-world countries, they have ruined many economic development activities.

5. Tax and customs fraud and other economic offences

83. When fraudulent actions constitute serious damage to a nation's economy, they reach indirectly individual rights, whether economic, social or cultural ones. The concept of fraud includes all actions intended to reduce tax liability or evade taxation. It means the direct or indirect violation of tax law. The concept is still a vague one and, although all countries combat the phenomenon, no clear definition has yet been arrived at either by consensus or on the basis of national judicial practice. It should be mentioned that the person engaging in fraud is usually also involved in corruption. The offences committed in the above-mentioned areas affect some very sensitive economic sectors. Since they are the main sources of revenue of the developing countries, they play a significant part in the overall development effort. Although they are legally well-protected sectors, they are often damaged by serious offences which shake the economies of the victim countries.

84. There are, of course, other economic offences, the number and importance of which will vary according to the economic situation of the country concerned. As is noted by Professor Fontan, the author of a study on the motivations of economic delinquents, the economy of shortages develops as much economic delinquency as the economy of abundance. Without entering into details of the economic offences at the internal level, I may say that they

are very serious sources of violations of the economic, social and cultural rights of individuals and peoples. A few of them may, however, be mentioned:

(a) Misappropriation of public funds;

(b) Misuse of company assets;

(c) Financial speculation;

(d) Unlawful enrichment;

(e) Laundering of drug money;

(f) The complicity of certain credit establishments in receiving funds which have been fraudulently acquired; and so forth.

85. These various offences, which are sources of serious violations of individual rights, are punishable in domestic legal systems with more or less effectiveness. At the international level, it may be feared that the methods adopted to combat this delinquency are of a rather empirical nature. Closer collaboration between the various countries concerned, outside the institutional framework of the United Nations, would be desirable.

II. THE CONSEQUENCES OF SUCH PRACTICES AND PROCEDURES FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND FOR COMMUNAL RIGHTS

86. The practices and procedures outlined above have a negative impact on economic, social and cultural rights of individuals and also on the collective rights (right to development and right to a healthy environment). They have led in the past, and continue to lead, to serious and large-scale violations of these rights and even to their being completely disregarded by those who are responsible for and benefit from them. This combination of ignorance on the one side and omission on the other is a source of difficulty for the achievement of human rights in general and economic, social and cultural rights in particular.

87. Slavery, colonization and apartheid, practices which have disappeared or are rapidly disappearing, were, in the recent past the main large-scale violations of collective or individual human rights. It should be pointed out here that these categories of rights are closely linked, as the former provide the framework for the enjoyment of the latter. These collective or communal rights are to individual economic, social and cultural rights what democracy and the state of law are to civil and political rights.

88. While civil and political rights are now an accepted and integral part of most national legislation, the same cannot be said for economic, social and cultural rights and collective rights which some States regard not as rights but as a factual situation. This erroneous idea does not resist a serious analysis of the legal and economic foundations of these rights. The extremely reluctant attitude of the developed countries concerning them is merely an expression of their selfishness.

A. Violations of collective or communal rights

1. Violations of the right to development

89. The right to development grew out of the economic inequality and the disadvantaged position of the underdeveloped countries. It should, moreover, be mentioned that the right to development establishes the principle of reparation to which are entitled the peoples and countries which had long been robbed of their wealth by slavery and colonization. The enormous inequalities of all sorts between poor countries and developed countries are the result of centuries of pillaging and exploitation during which civilizations were destroyed, social structures and means of production wiped out and the ecosystem devastated in Africa, Asia and Latin America. Unequal distribution of wealth and income at both the national and international levels has worsened in recent decades and has reached such dimensions as to be a genuine international scandal.

90. The Global Consultation on the Realization of the Right to Development as a Human Right, held at Geneva from 8 to 12 January 1990, essentially concluded that the traditional development strategy was transnational in scope and mainly consisted of creating modern industrial enclaves and zones of exclusion in the developing countries. Those enclaves and zones usually had nothing but negative effects and were part of the transnational corporations' strategy of spreading their activities among various countries, with their subsidiaries producing finished products for export markets or protected domestic markets. Such establishments have usually proved to be unstable because the parent company can decide, for commercial, economic or political reasons, to move its subsidiaries to other countries. The purpose of such practices is to evade the economic laws of the countries concerned and they alone constitute violations of the right to development of the populations of one or more countries.

91. Traditional development strategies have also resulted in the creation of privileged national élites which follow the same patterns of consumption as high-income groups in developed countries, while the great masses of the population cannot even meet their most basic needs. That is the way in which the leaders of developing countries, particularly in Africa, have been designing their national economic policies for almost half a century. I should not fail to mention that this gap in incomes and lifestyles is not limited to the developing countries; it also exists, and is becoming increasingly frequent, in the developed countries. As stated above, the actors and beneficiaries of these strategies constitute a minority, compared with an overwhelming but deprived majority.

92. Such practices, when combined with the perverse impact of indebtedness and of the deterioration in the terms of trade, together with the baneful activities of the transnational corporations, prevent the developing countries and their peoples from realizing their right to development.

2. Violations of the right to a healthy environment

93. The major environmental crises of recent decades have highlighted the transnational and multi-dimensional nature of their effects and have shown

that the solutions required are collective or communal ones which, consequently, can be carried out only by the international community and by the States themselves, either individually or in cooperation with the United Nations as called for in Articles 55 and 57 of the Charter. A balanced ecosystem, preservation of natural resources or simply the survival of the planet are urgent requirements.

94. The right to a healthy environment has been violated as a result of human activities which increase concentrations of greenhouse gases in the atmosphere, with all the consequent effects on global warming, rising sea levels and climate in general. While producing their own negative effects on the enjoyment of human rights in general and economic, social and cultural rights in particular, these phenomena have multiplier effects which also exacerbate the increasingly serious and numerous problems faced by the populations of poor regions. Human activities which affect the right to a healthy environment also take the form of deforestation and clearing which have occurred over a number of centuries.

95. According to the Secretary-General of the United Nations Conference on Environment and Development, the conservation of biological diversity is fundamental to human life. It is a basic factor in the way in which living organisms are structured. As such, it provides support for ecosystems, for the regulation of water and the atmosphere and the basis for agricultural production. When genetic variations are lost, therefore, the result is not only that specific and potential properties and adaptations are lost but also that the number of species is diminished, ecosystems are impaired and the ability to sustain human life is damaged. That destruction of the ecosystem and of the equilibrium necessary for the survival of our species is aggravated in modern life by the effects of such contemporary human activities as pollution, the dumping of toxic and hazardous wastes and so forth.

96. Pollution of the land, sea and air from various sources causes major risks to the life, health and well-being of populations. The Bhopal and Chernobyl disasters are just two examples among many which are still vivid memories. They claimed many victims. According to estimates by the League of Red Cross and Red Crescent Societies, the Chernobyl disaster affected, and continues to affect more than 4 million people, in addition to the 135,000 people evacuated from the villages closest to the reactor, who are still living on contaminated land. Those victims fear for their future, exposed as they are, as the scientists tell us, to congenital illnesses and malformations.

97. Ecological disasters, nuclear or otherwise, risk destroying every form of life. The right to a healthy environment is closely linked to economic, social and cultural rights. The exportation to developing countries, particularly in Africa, of hazardous waste produced by the industries of the North is, in my opinion, a serious violation of the most important human rights, foremost of which is the right to life. However, individuals and companies prompted by the allure of gain, have engaged in transactions for the transfer of industrial wastes in utter disregard of the rights of individuals and peoples.

98. The scandals of 1987 and 1988 which followed the discovery of deals whereby African countries received derisory sums of money from western companies in return for the use of land for the dumping and burial of toxic waste, brought a justifiably violent reaction from some developing countries. It is in that context that the Council of Ministers of the Organization of African Unity (OAU) declared in its resolution 1153 (XLVIII) of 25 May 1988 that such dumping was a crime against Africa and the African people. On 7 December 1988, the United Nations, following in the footsteps of OAU, adopted a resolution in which it expressed profound concern regarding practices of dumping nuclear and industrial wastes in Africa. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was the result of a compromise between those who favoured a complete ban on transboundary movements of waste and those who wished to define the framework and legal conditions for the transfer of wastes.

99. Any transaction for the transfer of wastes is a serious violation of the right to a healthy environment and, quite obviously, of the whole set of human rights, whether individual or collective, economic, social and cultural or civil and political. Given the extent of violations of the right to a healthy environment, the international community expressed its profound concern, at the 1992 Earth Summit, noting that some international movements of toxic wastes were in contravention of national legislation and existing international instruments, seriously damaging the environment and public health in all countries, particularly the developing ones.

B. Violations of individual economic, social and cultural rights

100. Individual economic, social and cultural rights are essentially the right to work and the rights to adequate food, health, housing and education. There is no doubt that those rights rest on the most important right of all, namely, the right to life. They all revolve around and centre on that right, if by "life" is meant everything that contributes to the continued existence and improvement of the human condition. In the view of some people, these rights constitute an ideal to be achieved, i.e. they are not immediately claimable. This view is incorrect since these rights have a firm legal foundation and can be claimed at any moment and their violations punished.

1. Violations of the right to work

101. An International Labour Organization report, the World Labour Report 1995, explains that the employment situation in developing countries, particularly in sub-Saharan Africa, is determined by local market conditions which discourage both domestic and foreign investment. The explanations provided by the Director-General of the International Labour Organization (ILO) are far from satisfactory, especially when he states that African countries should undertake major reforms. In my opinion, the explanation is rather to be found in the injustice and imbalance engendered by the world economic order. The ILO report suggests that the only area where Africa has not been marginalized is that of aid. I think that the "aid" in question could easily be discontinued entirely if the world's wealth were distributed equitably among all nations.

102. Shortages or serious crises have inevitable consequences on the labour market with increasingly frequent recessions hampering the development of any policy aimed at improving the conditions of the worker and his family. Unemployment becomes a daily concern for the individual as well as for society and the search for work a priority. Workers and their families who are affected by job instability or insecurity are extremely vulnerable.

103. Workers also face serious risks in performing certain jobs which they are forced to accept because of the difficult economic situation. Nowadays, the ILO conventions prescribing workplace hygiene measures are never observed anywhere. This is a serious violation of the worker's rights. Migrant workers are certainly those most affected because of their clandestine recruitment and sometimes even of the complicity of the host State. Violations of the right to work take several forms, as noted by the Special Rapporteur in his second progress report on the realization of economic, social and cultural rights:

(a) Extreme falls in wage levels, with corresponding declines in living standards;

(b) Increased levels of unemployment;

(c) Reductions in worker protection in terms of occupational health and safety standards;

(d) Limitations on the right to strike;

(e) Weakened bargaining power of the industrial working class; and

(f) Many violent social conflicts that can lead to serious political and economic crises.

These are the main consequences of violations of the right to work, though other less serious consequences can derive from them also.

2. The right to health

104. Health today gives cause for concern because it is precarious and restricted to some privileged groups of people that are becoming fewer and rarer. In many countries, particularly developing ones, the health system consists of a few small islands in a sea of excluded people without access to health care in its most elementary form. For a very large part of the population, health care is inaccessible because of its cost. The spread of serious diseases, the ease of their propagation and the resistance being built up by their germ vectors should lead to greater solidarity between the rich and the poor, since the security of the rich lies in providing for the health needs of the poor. Actually, the continents have grown closer together and no disease or human suffering can be contained within a State's borders.

105. The cost of health care is weighing heavily on the economies of all families and of all States, whether large or small, developed or developing. Medical treatment is as expensive as the medication needed to treat the illness diagnosed. This situation puts health - the minimum needed for health

care - beyond the reach of the most disadvantaged segments of society, namely, workers and their families, children, women and the elderly. For these groups of human beings, the right to health is an inaccessible luxury.

106. This right to health should be understood as both an individual and a collective right and should be a constant concern of the international community, of States and of individuals. The international community should be more involved and cooperate more with States, in accordance with the Charter of the United Nations. To be successful, however, such cooperation requires a new balance in the world economic order and all its subsidiary systems. It is a well-known fact that 20 per cent of the world's population controls 80 per cent of the world's resources and technological benefits. This increasingly pronounced imbalance exposes the disadvantaged vulnerable groups and peoples of the third world to serious shortfalls in all areas, including health. The concentration of pharmaceutical industries and the means of combating serious contemporary diseases (such as AIDS) in the hands of a few industrialized countries prevents most of the world's population from benefiting from the major scientific achievements and discoveries of this century.

3. The right to adequate food

107. Putting an end to hunger and poverty, both present and future, is an old promise of the international community which was made after the Second World War. That promise has never been kept, nor has any serious effort ever really been made to keep it. The wealthy Powers preferred to embark on an insane and increasingly expensive arms race which drained their economies towards military objectives and diverted funds from aid that could have helped the developing countries. It has been said that, if the arms-producing countries withheld 5 per cent of their military expenses and paid those funds out to the needy countries and peoples, the latter would be able to undertake, and probably to succeed in, launching their economic development, as long as the current economic order becomes fairer and more equitable, of course. Famine is rife in many countries and is now affecting people who were previously believed to be safe from it. Food shortages, compounded by burgeoning growth in world population, make the realization of the right to adequate food daily more remote.

108. Moreover, the pollution resulting from industrialization and the use of certain substances is leading to the destruction of all forms of animal and plant life and consequently of all sources of food. The reckless deforestation of some areas of the third world, which has not been accompanied by any reafforestation, has worsened the situation and has caused the desertification of hitherto arable land. The right to adequate food is not simply a matter of the abundance of food, but also of its quality and of the struggle against the widespread increase in malnutrition among vulnerable groups. The rising costs of food, declining food security, lower production costs and cutbacks in public subsidies on basic foodstuffs are also obstacles to the realization of the right to adequate food. Nowadays, many families spend most if not all of their income on food. The widespread decline in household purchasing power, compounded by the rising costs of food products, has a negative impact on the realization of that right.

109. As things stand, one man in every five never eats his fill and the situation is becoming worse in all countries, particularly in the third world. The scarcity and cost of foodstuffs are spreading to all parts of the world and are seriously endangering the right of every person to have a minimum amount of food to survive. Speculative dealings in foodstuffs of prime necessity by some national and international firms, especially with regard to importation and distribution, seriously imperil everyone's right to a minimum of food.

4. The right to adequate housing

110. The right to adequate or decent housing is based on a set of norms related to the other rights of the individual and his human environment. Implementation of this right is a contribution to a people's cultural life and provides the necessary harmony between man and his habitat. Realization of the right must thus take into account the cultural and social elements of the people concerned. Importing housing models is often, if not always, destructive of that harmony.

111. The housing crisis of past decades was, for many persons and peoples, the result of a disregard for the right to adequate housing. One United Nations document stated that the difficult economic situation of many countries in the early 1980s was reflected in a rapid decline in resources available for investments and related services in the field of human settlements. National housing subsidies, rent controls and housing loans have been steadily diminishing.

112. The extent of speculation on housing has meant that, for thousands of people, the right to be properly housed has been increasingly difficult to realize. Such speculation has furthermore facilitated the development of eviction procedures which take no account of the human right to housing. The absence of appropriate control by the public administration has deprived the right of all its content. In any case, it should be recalled that the public authorities themselves very often embark on the nationalization or expropriation of settled lands without providing any compensation to those affected.

5. The right to education

113. The right to education is increasingly difficult or even impossible to realize in many countries, especially in the third world. Like all economic rights, it requires a financial and material base which is not available to the greater part of the population. The right to education means that an individual has the possibility to receive education, to provide it for his children and to be free in the choice of that education. Violations of and disregard for the right to education take the form of insufficient schooling for children, a high proportion of school drop-outs and constantly declining rates of literacy. These practices are sometimes tantamount to a pure and simple negation of the right. The quality and standard of education is at present being seriously affected as a result of the shorter working hours, smaller numbers and diminishing skills of teachers.

114. A UNESCO study shows that, in the hundred least advanced countries, the education budget has been more than halved over 10 years. This reveals a clear lack of concern for education on the part of national authorities. The World Bank has shown very little regard for the difficulties surrounding the realization of the right to education by imposing harsh cuts in the educational budgets of developing countries. The principle of free primary and even secondary education in many African countries had, in the past, enabled many poor people to receive at least basic teaching. Now that this principle has been abandoned, education, which has become as expensive as health and housing, is out of the reach of the most deprived segments of the population.

115. The effective enjoyment by every individual of the right to education should be a constant concern of national and international institutions, whether private or public. In seeking such enjoyment, it should be borne in mind that the individual is not only the beneficiary but also the architect. Education must not be an instrument for the destruction of the culture of the peoples or the social fabric on which they are built. Literacy campaigns must ensure that literacy is functional so that the individual is able to make use of it in carrying out his work, particularly in labouring and agricultural environments. Consequently, literacy courses must not be a simple teaching of the letters of an alphabet but also be applicable to the recipient's vocational life.

C. Violations of the economic, social and cultural rights of vulnerable groups

116. The so-called vulnerable groups, which include children, women, migrant workers, the old and the poor, are the most exposed to and the most affected by human rights violations. In a document entitled "Overall Socio-economic Perspective of the World Economy to the Year 2000", the United Nations comments that, as the overall economic prospects for Africa and Asia are unfavourable, with very slow or nil income growth, the incomes of the poor would not rise enough to eliminate poverty and undernutrition. The World Bank adds that 0.7 per cent of GDP, which would be equivalent to a 20 per cent income tax on the richest fifth of the world's population, would be sufficient to raise the income of all the poor in Africa to just above the poverty threshold. Of course, the advanced economies are also suffering from the current world economic crisis. They have been forced as a result to adopt drastic measures which have led to mass unemployment, inflation and real insecurity.

117. In some developed countries, particularly in Europe, restructuring and economic policies should be expressly aimed at improving the fate of deprived fringe groups such as invalids, migrants and the members of ethnic minorities, while ensuring a full participation by these groups in the economic, political and social life of the nation. It should be emphasized that the steps taken by the international financial institutions in the framework of their policies and programmes of action have had the major consequence of aggravating poverty and widening the gap between rich and poor.

118. The problems are still more severe in rural areas, where the failures of political and economic policies are more acutely felt. Thus, millions of

people living in rural areas cross the threshold of absolute poverty every day. Poverty also affects the developed countries with liberal economies, where all the sectors of the population which are unable to compete are pushed aside. All the economic, social and cultural rights of the poor are thus violated or simply disregarded without any effort being made to interrupt the process. In this case, the economic base is a constituent part of the individual's right. The same applies to women, old people and workers. It should be recalled that the United Nations and its specialized agencies have, with the participation of the Member States, prepared a series of international instruments aimed at combating and eliminating the ills suffered by these groups. Drafting a legal instrument is one thing, however, and applying it is another. The economic protection of vulnerable groups is an essential prerequisite for the realization of their economic rights. This obligation, for which the States and the international community are responsible, has often been and may long continue to be ignored in view of the lack of will on all sides.

III. THE CAMPAIGN AGAINST IMPUNITY FOR VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

119. Organizing the campaign against impunity for violations of economic, social and cultural rights, if it is to have any effect, requires comprehensive, detailed and objective investigations. To this end, the analysis of the problem in the first part regarding impunity for violations of civil and political rights may be considered relevant. As far as the violations of economic, social and cultural rights discussed in this part are concerned, there appear to be two types of action worth considering:

(a) Preventive action, including all political, economic, legislative and administrative measures aimed at eliminating all practices and all procedures conducive to violations of economic, social and cultural rights; and

(b) Repressive and/or remedial action, aimed at penalizing violations which have already been committed. Sanctions could take the form of a series of practical measures, such as restitution, indemnification, compensation, cancellation, reparation, reinstatement, etc.

120. Clearly, where economic, social and cultural rights are concerned, remedial sanctions are by far the most important and the most significant, which does not mean to say that the importance of repressive sanctions should be overlooked. Both types of sanctions respond to the need for justice required to satisfy public opinion and to achieve national reconciliation, where appropriate.

A. Measures to prevent violations of economic, social and cultural rights

121. The experience of several decades of efforts to realize economic, social and cultural rights has brought to light many difficulties related to the very nature of the rights concerned and to the specific character of the peoples and regions of the world which are their beneficiaries. While it is true that every people or region has its own specific character, the necessary

interdependence between the different human rights must not be overlooked. Preventing the violation of these rights is a task which must be jointly undertaken by the States and the international community. It should also be remembered that each State is responsible for drafting appropriate legislation and regulations and for implementing an economic and social policy allowing individuals and peoples to enjoy their economic, social and cultural rights.

122. The preventive measures being considered here are important and go some way towards offsetting the vagueness surrounding economic offences and the related sanctions. One doubt, as regards international law in particular, concerns the empirical means deployed. In this respect, there should be close cooperation among States and between them and the international community. Successful prevention of violations of economic, social, cultural, or of any other rights, is undoubtedly the ideal solution, though also the most difficult to achieve. It requires an effort to inform and re-educate public opinion and a more courageous political attitude on the part of the Governments of the States on whose territories violations of human rights are committed.

123. From an international point of view, it is worth recalling the now classic suggestion that a more coercive and more coherent legal framework should be set up to induce States to accept their obligations under international law, which now provides for State responsibility. This recognition of State responsibility was further strengthened by the Brussels Convention of 25 May 1962 on the liability of operators of nuclear ships, the International Convention of 29 November 1969 on civil liability for oil pollution damage and the Vienna Convention of 29 November 1971 on the international liability for damage caused by space objects.

124. Recommendations on international cooperation for crime prevention and criminal justice in the context of development were adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana in August and September 1990. In those recommendations, Governments were urged to promulgate laws to combat transnational crime and illegal international transactions. It was mentioned that, since even legitimate enterprises, organizations and associations were sometimes involved in transnational criminal activities affecting national economies, Governments should adopt measures to control such activities. They should also collect information from various sources so as to have a solid basis for the detection and punishment of enterprises and organizations, their officials, or both, if they were involved in such activities. It was suggested that States should devise effective criminal legislation to combat the corrupt activities of public officials, which could hinder development and damage individuals or the entire nation.

125. In other words, in domestic law, all mechanisms and practices leading to violations of economic, social and cultural rights should be identified as punishable offences, giving entitlement to compensation. In its General Comment No. 3 (1990), the Committee on Economic, Social and Cultural Rights discussed the nature of States parties' obligations under article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and stated, inter alia, that the adoption of legislative measures was by no means exhaustive of the obligations of the States parties and that the

phrase "by all appropriate means" should be given its full and natural meaning; such measures should include the provision of judicial remedies with respect to those rights. That means, incidentally that States should avoid any deliberately retrogressive measures in that regard.

126. At the international level, measures to prevent violations of economic, social and cultural rights are of many different kinds. Some of them could be drawn up by the United Nations in cooperation with the Member States, while others would be prepared by States in the framework of regional organizations. They could also result from an action by the specialized agencies of the United Nations system. Among the measures which the United Nations could adopt, I might mention: the preparation and adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, like the one already existing with regard to civil and political rights. It would be supported by the obligation on the part of States to report to the Committee on Economic, Social and Cultural Rights concerning all measures taken for the effective enjoyment of these rights and the penalties applied to violations thereof. Although applying the procedures of an optional protocol would not give the Committee any jurisdictional authority, it would provide an opportunity through regular reports and individual communications to submit useful recommendations to the States parties and would make a major contribution to the campaign against impunity for violations of economic, social and cultural rights. Pending the establishment and functioning of such a procedure, it would be worthwhile encouraging the Committee on the Elimination of Racial Discrimination, the Human Rights Committee and the Working Group on Communications (1503 Procedure) to examine periodic reports by States and individual communications.

127. The international community should endeavour to rectify current deviations from the missions of the international financial institutions. In 1944, the Bretton Woods Conference agreed to set up two international financial institutions: the International Monetary Fund (IMF) and the World Bank. Article 1 of the IMF Articles of Agreement establishes six purposes for the Fund, one of them being to facilitate the expansion and balanced growth of international trade and thereby to contribute to the promotion and maintenance of high levels of employment and real income and to the development of productive resources. The international community must attempt to bring these institutions back to their initial purposes.

128. In the preparation of preventive measures against violations of economic, social and cultural rights, the non-governmental organizations could, within the framework of their information and popularization activities, help the campaign considerably by denouncing such violations and suggesting solutions. With regard more specifically to cultural wealth, it would be important and essential to prepare and have the States adopt a convention protecting the cultural wealth of peoples, to declare any traffic involving such wealth to be a crime against humanity and to ask States to introduce penalties for such acts into their domestic legislation.

B. Jurisdictional measures against impunity

129. Violations of economic, social and cultural rights give entitlement to a remedy for the damage they have caused. From the point of view of domestic

legislation, such violations are offences and subject to two types of sanction, repressive and compensatory. Under its guarantee obligation, the State has to provide the necessary legal framework to safeguard the enjoyment of economic, social and cultural rights. The best way of achieving this is to incorporate the international legal standards into domestic law, so that they can be invoked before the domestic authorities and courts. If violations extend beyond domestic boundaries and affect several countries, the international responsibility of their perpetrators, whether individuals, human groups, companies, States or regional or international organizations, becomes engaged. There are thus two types of responsibility, national and international. It should be pointed out that these are not cumulative; they are complementary or supplementary. Thus, the international responsibility of a subject of law can be invoked only when no domestic remedy is available or if domestic remedies have been exhausted or are inadequate.

130. While, under domestic law, criminal law offences are dealt with under enforceable legislation, the same is not true in international law, where States freely decide their conduct. Thus, an international offence, as determined by international legal standards, is the result of an act or of conduct that is morally and legally imputable to a subject of international law. Punishment of an economic crime and remedying the damage it causes raise a number of questions: Who is responsible for the offence which is the source of the damage?; Who is the victim of the resultant damage? and What forms of remedy are possible?

1. Who is responsible?

131. In many cases, those responsible for violations of economic, social and cultural rights and of the collective rights with an economic content such as the right to development or the right to a healthy environment, are international entities applying policies which constitute veritable sources of large-scale and serious violations of collective and individual rights in the countries with weak economies. At this level, the responsibility is collective. The most typical example is the case of debt management by the international financial institutions. It is also the case with structural adjustment programmes whose consequences are disastrous for the economies of the developing countries. The responsibility of the international community is great with regard to economic policies favouring the developed countries which widen daily the gap between rich and poor countries. The maintenance of the existing economic order with these injustices and its failure to adapt to economic realities, rectification of which has been constantly demanded but in vain, is also a responsibility of the international community. In the case of the violations which now form part of history, it is for the international community to undertake the necessary actions to remedy justly the harm done to the victim peoples. It should do so in cooperation with all the actors on the international stage.

132. The violations committed by the transnational corporations in their mainly transboundary activities do not come within the competence of a single State and, to prevent contradictions and inadequacies in the remedies and sanctions decided upon by States individually or as a group, should form the subject of special attention. The States and the international community should combine their efforts so as to contain such activities by the

establishment of legal standards capable of achieving that objective. The same is true of the looting of the cultural heritage of the third-world peoples and countries. Until quite recently, only States were subject of international law but individuals and groups of individuals can now take legal action or be summoned before international authorities to answer for their activities. The international community must establish a legal framework which will make it possible to bring actions, with some hope of success, for redress or punishment, a framework that would be supplemented by the principle of universal jurisdiction. To meet this responsibility more effectively, the international community must obtain from the States the commitment to include in their domestic legal systems international standards concerning human rights, while respecting their international obligations.

133. Under both domestic and international law, an act violating the rights of an individual or a group renders the perpetrator responsible. The juridical acts that give rise to obligations entailing the responsibility of a subject of law (an individual or a State) are specified by law. It is true that State responsibility is indisputable in positive law. It has, in fact, gained recognition, however belatedly, in the domestic sphere, where it had long seemed virtually incompatible with the lopsided relationship between the State and its subjects. The modern State engages in activities, some of which are government acts connected directly with the exercise of sovereignty while others are management activities carried out exactly like private activities subject to the rules of private law. In all cases, the responsibility of the State can be engaged in the event of violation of the rights of an individual or a group. Economic, social and cultural rights are generally connected with an economic activity and it is in this framework that they are most often violated.

134. The responsibility of the State is entire when the violations result from the malfunctioning of the civil service, whatever be the cause. The State cannot invoke either its own legislation or the incompetence or disobedience of its agents to exonerate it from its responsibility, whether the actions in question are government ones or purely managerial. In connection with the behaviour of State agents, abundant case-law from the Nürnberg International Tribunal that neither disobedience to or the execution of a clearly unlawful order reduces in any way the responsibility of the State. An occupying Power is responsible for violations committed in the occupied territory. The implementation of such responsibilities requires a certain amount of cooperation between States and the international community and a good dose of political courage.

135. Violations of economic, social and cultural rights can also be perpetrated by private individuals. In the vast majority of States, such violations are punishable offences or are, at any rate, subject to a procedure of civil compensation. It is for the State to devise an adequate legal framework. In that connection, it is most reprehensible that certain States should establish legislation which protect the goods or property of certain national companies and give them total impunity for any violations they commit of the economic, social and cultural rights of citizens or private economic groupings. Thus, in some countries, there is no means of obtaining execution

on the property of nationalized companies. There can be no attachment of any of their goods although, in more and more cases, they are acting like private companies or individuals.

2. Who is the victim?

136. The victims of violations of economic, social and cultural rights can be groups or individuals. To obtain a clearer idea of the concept of victim, it is worthwhile referring to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. "'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury ... or substantial impairment of their fundamental rights". In this case, the victims are those who have directly and personally suffered the harm arising from the violations. Another, broader, approach is to understand by victim anyone who can prove that he has suffered harm. The injury for which reparation is requested may be material or moral. All national legislations have long accepted compensation for moral injury, both for the direct victim and for his heirs. In the international sphere, this idea would seem to be slowly but surely gaining acceptance. It may be inferred from the current case-law of the international legal bodies that the basis for determining the amount and nature of the compensation is not solely the physical or material injury or damage but also the direct or indirect moral injury. In its observations on communication No. 107/1981, the Human Rights Committee stated that the mother of a disappeared person was herself a victim: "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts ... In these respects, she too is a victim of the violations of the Covenant suffered by her daughter ...". Other international bodies, such as the Committee on the Elimination of Racial Discrimination, the Commission of Inquiry set up by the International Labour Organization and the European Court of Human Rights, have all confirmed the principle of compensation for moral injury. In view of the large-scale and systematic violations of which the third-world peoples have been victims in the recent past, such as slavery, colonization and cultural looting, it is obvious that there could only be a global remedy, the purpose of which is to re-establish these peoples in their communal rights by returning to them the goods of which they have been unlawfully dispossessed. These collective claims can be managed and successfully concluded only with the cooperation of the international community and the manifestation of the will of every actor on the international stage.

137. The status of victim and the rights attaching thereto are transmissible to the successors. This concept of successor should be understood in a wide sense and comprise, in addition to the direct victim and his heirs and assigns, legal entities whose purpose is to defend the economic rights of individuals or groups whose rights have been violated. This is the case of trade unions and could be that of non-governmental organizations. As regards trade unions, the case-law of the European Court of Human Rights has already enshrined the principle by enabling them to submit to it for consideration a collective labour conflict. In economic matters, the victims are often groups of people since the rights violated are often collective ones that affect large segments of the population. This in no way extenuates individual

violations of economic, social and cultural rights. The many different forms of violation require different kinds of penalties, mainly of an economic nature as mentioned above.

3. Possible penalties

138. The State has the obligation to establish the necessary legal framework to punish violations of economic, social and cultural rights in accordance with the provisions of the international instruments mentioned above. This idea is summarized in the decision handed down by the Inter-American Court of Human Rights in the Velásquez Rodríguez case:

> "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."

139. The remedies for damage resulting from violations of economic, social and cultural rights will vary according to whether the rights violated are collective or individual. In the case of collective rights, the appropriate penalty must be of an essentially reparative nature. Thus, for example, compensation in the form of cancellation of debt and debt-servicing could partly repair the injury caused by slavery and colonization. As already pointed out, there are numerous historical and legal reasons to justify, in many cases, cancelling and in others reorganizing debt on more satisfactory terms, periods of repayment, grace periods and rates of interest. The question of debt and its cancellation has consistently been raised by the developing countries. Indeed, cancellation of the debt of formerly colonized countries was raised as long ago as the second session of the United Nations Conference on Trade and Development, held at New Delhi. Mr. Louis Nègre, the then Minister of Finance of Mali, made the following statement:

> "Many countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign Powers ... Beyond purely legal considerations and rightful claims, we merely wish to ask the developed creditor countries to show a greater spirit of equity or even justice by proposing, as a test of their goodwill, the cancellation of all debts contracted during the colonial period by interests that were essentially not our own, and for whose servicing our States are unjustly responsible."

140. History has shown that the huge present-day inequalities between developed and poor countries are the result of centuries of plundering and exploitation during which civilizations, social structures and indigenous modes of production were destroyed and during which the ecosystems of Africa, America and Asia were pillaged. The spoliation of many countries and the impoverishment of large segments of the population are contiruing in different forms: deterioration of the terms of trade, transfer of resources from the South to the North, capital flight, structural adjustment, etc. As for cultural goods and those illegally acquired during the period of apartheid, the adequate form of remedy is restitution where this is possible. Those who

have been illegally dispossessed must be able to retrieve their full property and cultural goods must be given back to the peoples who are their genuine owners.

141. As for the violations of individual rights, the harm they have caused can be remedied in several ways such as rehiring (in matter of employment), compensation, rehabilitation, ending the violations, etc. These actions presuppose the existence of a useful and effective system of recourse to the national courts and administrative authorities. It is important that the victims, whatever the form of remedy sought, should obtain satisfaction in accordance with the legal provisions in force. Recourse proceedings, though not a remedy in themselves, make it possible to achieve a remedy. That is why the State must, in the framework of its legislation, so arrange the legal regime of these recourse proceedings as to make them readily accessible.

Suggestions

142. At the present stage of efforts to combat impunity for violations of economic, social and cultural rights, the following suggestions may be made:

(a) In view of the large-scale violations of the economic, social and cultural rights of countries and peoples that were colonized or subjected to slavery, and as compensation for the injury suffered, all or part of the debt and debt-servicing of the States concerned should be cancelled; if appropriate, the remaining debt should then be reorganized on fairer and more humane terms. This approach would eliminate a number of violations of economic, social and cultural rights and simultaneously remind the Bretton Woods institutions of their primary mission, as set out in article 1 of the statute of IMF;

(b) Violations of economic, social and cultural rights should be declared international crimes that are consequently subject to the principles of universal jurisdiction and imprescriptibility, so that they can be punished at any time and in any place;

(c) An optional protocol on economic, social and cultural rights, similar to the Optional Protocol to the International Covenant on Civil and Political Rights, should be drawn up and adopted by the States, which would thus be required to report on the measures adopted or to be adopted for a genuine implementation and improved protection of economic, social and cultural rights;

(d) More sophisticated standards should be proposed to States to combat impunity in cases of corruption, misappropriation of public or private funds, abuse of trust by public officials, and tax and customs fraud and, lastly, efforts to combat them should be strengthened and greater consideration given to the harm suffered by the victims; and

(e) Machinery for monitoring the management of public affairs should be established and constantly improved by providing appropriate material and financial assistance to States requesting it.

Recommendations

143. The many contributions of the non-governmental organizations and of some of the expert members of the Sub-Commission have given me the idea of suggesting the holding of a high-level international meeting on the impunity of perpetrators of violations of economic, social and cultural rights for the purpose of sharing and comparing information and assessments from different sources as material required for the preparation of the final report. Such a meeting would also make it possible for the organizations affiliated to the United Nations (UNESCO, ILO, IMF, WHO, etc.) to make their contribution in their spheres of competence. These suggestions and recommendations, which are far from exhaustive, could be supplemented by those made by the other experts, the representatives of Governments and the non-governmental organizations.

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Agenda item 10

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Report of the sessional working group on the administration of justice and the question of compensation

Chairman-Rapporteur: Mr. Louis Joinet

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Introduction

1. In accordance with the decision taken by the Sub-Commission on 6 August 1996, a sessional working group of the Sub-Commission on the administration of justice and the question of compensation held its first meeting on 7 August 1996. The following experts were appointed as members of the working group on 7 August 1996: Mr. Stanislav Chernichenko (Eastern Europe), Mr. Alberto Diaz Uribe (Latin America), Mr. El-Hadji Guissé (Africa), Mr. Louis Joinet (Western European and other States) and Mr. Sang Yong Park (Asia).

2. The working group held three meetings, on 7, 9 and 13 August 1996.

3. A representative of the Centre for Human Rights opened the session of the working group on behalf of the High Commissioner for Human Rights and the Assistant Secretary-General for Human Rights.

4. The working group designated Mr. Louis Joinet as Chairman-Rapporteur for its 1996 session.

5. The following members of the Sub-Commission not members of the working group also took part in the general discussion: Mr. Miguel Alfonso Martínez (1st and 2nd meetings), Mr. Mohammad Sardar Ali Khan (1st meeting), Mr. Osman El-Hajjé (1st and 2nd meetings), Mr. Zhong Shukong (1st and 2nd meetings), Ms. Lucy Gwanmesia (1st and 2nd meetings), Mr. Yozo Yokota (1st and 2nd meetings), and Mr. David Weissbrodt (1st and 2nd meetings).

6. Following the adoption of the agenda, the working group decided to invite Mr. Theo van Boven, former Special Rapporteur of the Sub-Commission on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, to participate in the discussion on the agenda item relating to basic principles and guidelines on the right to reparation.

7. Statements were made by representatives of the following non-governmental organizations in consultative status with the Economic and Social Council: Amnesty International (2nd meeting), International Commission of Jurists (2nd meeting) and International Association against Torture (2nd meeting).

8. The working group had before it the following documents relating to its provisional agenda (E/CN.4/Sub.2/1996/WG.1/L.1):

Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117 (E/CN.4/Sub.2/1996/17);

Note by the Secretariat on juvenile justice (E/CN.4/Sub.2/1996/WG.1/CRP.1);

Note by the Secretariat on follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance (E/CN.4/Sub.2/1996/WG.1/CRP.2);

Note du Secrétariat sur le rapport de suivi de l'evolution de la peine de mort (E/CN.4/Sub.2/1996/WG.1/CRP.3, available only in French);

Ninth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur (E/CN.4/Sub.2/1996/19);

Report of the sessional working group on the administration of justice and the question of compensation on its 1995 session (E/CN.4/Sub.2/1995/16).

Adoption of the agenda

9. At its 1st meeting, the working group considered the provisional agenda. At the suggestion of the Chairman-Rapporteur, based on informal consultations with other members of the working group, the working group decided to adopt the following agenda:

1. Basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law.

2. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

   (b) Summary, arbitrary and extrajudicial executions.

3. Follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance.

4. Habeas corpus as a non-derogable right and as one of the requirements for the right to a fair trial.

5. Advisability of maintaining the agenda item on juvenile justice.

6. Measures to be taken to give full effect to the Convention on the Prevention and Punishment of the Crime of Genocide.

7. Provisional agenda for the next session.

8. Adoption of the report of the working group to the Sub-Commission.

I. BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW

10. By its decision 1995/117, the Sub-Commission decided to request the working group to continue with priority, at the forty-eighth session, the consideration of the draft basic principles and guidelines proposed by the Special Rapporteur, Mr. Theo van Boven, with a view to making substantive progress in the matter.

11. In his opening statement, the representative of the Centre for Human Rights pointed out that the working group had last year made tangible progress in its examination of the draft principles and guidelines, which was reflected in its report. He expressed confidence that the group would do its best to complete the consideration of the draft during the present session.

12. Mr. Theo van Boven introduced the revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by him pursuant to Sub-Commission decision 1995/117. He stated that in the revised set of basic principles and guidelines many of the comments received from States and intergovernmental and non-governmental organizations, as well as the relevant comments and suggestions made by the members of the working group at its 1994 and 1995 sessions, had been taken into account.

13. In the preparation of the revised document he had the benefit of broad expertise assembled at a workshop organized by the International Commission of Jurists and the Maastricht Centre for Human Rights of the University of Limburg which met in Geneva from 20 to 22 February 1996. The text (E/CN.4/Sub.2/1996/17, annex) was the result of an in-depth consideration of the subject by the workshop in the light of the comments and reports referred to above. It should be noted that a new title was proposed to reflect the contents of the revised document: Basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law.

14. Mr. van Boven mentioned the major changes in the revised text. In the title, he proposed to use the word "reparation" in place of the words "restitution, compensation and rehabilitation". In his view, the concept of "reparation" was general in nature and included all the other terms; that generic term was used both in international and domestic law. At the end of the title he had added the words "and humanitarian law" in the light of the comments made by the International Committee of the Red Cross.

15. The Special Rapporteur pointed out that he had taken into consideration the remarks expressed at two previous sessions of the group concerning gross violations of human rights and had decided not to spell them out. He had combined some subparagraphs, reorganized and consolidated the text as a whole, and the draft now consisted of 15 principles instead of 20. However, the principle of gross violations was retained. The first part of the draft contained principles plus a limited number of provisions relating to what was originally listed under procedures and mechanism (arts. 1-11). The second part of the draft dealt with different forms of reparation which included restitution, compensation, rehabilitation and satisfaction (arts. 12-15).

16. Mr. van Boven stated that he had included two new elements in the text. One related to applicable norms and was formulated in article 3. Referring to the remarks expressed at the 1995 session of the working group on the right to remedy, he had decided to include that notion in article 4. He considered the notion of remedy as a recourse procedure available to any person claiming that his or her rights had been violated.

17. Mr. Chernichenko expressed the opinion that the principles and guidelines dealt not only with gross violations but with all violations of human rights. Consequently, the word "gross" should be deleted in the text. There was a discrepancy between violation of human rights and violation of humanitarian law. It would probably be advisable to delete the words "humanitarian law" and to point out that the principles were applicable in time of peace as well as during armed conflicts, with a view to guaranteeing the observance of the international human rights law and humanitarian law. It was also advisable to include in the draft a new principle recommending every State to make a list of gross violations of human rights which could be embodied in its legislation.

18. Mr. Zhong said that Mr. van Boven had improved his draft by taking into account many views expressed at the 1995 session of the working group. He suggested to replace in the first sentence of principle 2 the words "remedies and reparation" by "remedies or reparation". He also proposed to replace in the title the words "humanitarian law" by words "international law". He further suggested to insert in the subheading "Reparations may take any one ...", after the word "Reparations", the words "shall be provided in accordance with the law of the State concerned". This proposal was supported by Mr. Yokota. Mr. Guissé expressed his reservations concerning the reference to the law of the State concerned.

19. Mr. Yokota considered that the notion of gross violations of human rights should be included in principle 6. In his view, the second sentence of new principle 3 relating to applicable norms was not clearly formulated. With reference to principle 4, he asked who would bear responsibility for access to international procedures for the protection of human rights of persons. In his opinion, the term "universal jurisdiction" had a broad connotation and should be made more precise in the second part of principle 5. He also considered the term "statute of limitation" in principle 9 to be very controversial; it should be reworded by taking into account different "statutes of limitations" existing in the States concerned.

20. Mr. Yokota said he wished to delete the reference to "humanitarian law" and to replace it by "international law". Mr. Guissé, however, felt that the reference to humanitarian law must be retained to ensure protection in peacetime as well as in times of armed conflict. In his opinion, the references to both humanitarian and international law would make it possible to ensure full protection of victims.

21. Mr. Guissé suggested replacing the current title of draft principles 4 and 5 ("Right to a remedy"), by "Right to recourse", a more general and less limiting concept.

22. Replying to Mr. Yokota's comments, Mr. Guissé said he considered it essential to mention both individual and collective reparation in the context of the existence of two types of human rights, individual and collective, in the section of the draft principles entitled "Reparation". He explained that individual and collective reparation were complementary, rather than mutually exclusive, and that both must be included in the draft principles in order to ensure full reparation.

23. He thought that the application abroad of principle 8 might conflict with the regulations governing territorial jurisdiction. He recommended that principle 9 should not be limited to the concept of statutes of limitation but should be expanded to include pardons and amnesties in order to preserve the right of victims to bring a civil action.

24. Mr. Alfonso Martínez expressed disagreement with the title as he did not see why the document should be limited to gross violations alone: what was the limit between gross violations and those that were not? He also reiterated his concern that the document should refer to international humanitarian law and should not be limited to international human rights law. The duty of a State to respect human rights was based not only on the international obligations accepted by the State but, first and foremost, on its domestic regulations on human rights and fundamental freedoms. It was necessary to guarantee access to the relevant international procedures.

25. Ms. Gwamnesia stated that principles 2, 3 and 5 should not only afford civil remedies and reparation to victims but they should also deal with prosecution of persons who committed offences of an international nature. In her opinion, it was necessary to take into account in principle 2 the inquisitorial and accusatorial systems applicable in the world today. She proposed to delete the word "gross" in principle 5 because the term implied that a person would have to commit a similar crime several times before he could be brought to justice.

26. Mr. van Boven pointed out that the Sub-Commission, in its resolution 1989/13, had entrusted him "with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violation of human rights ...". The term "gross violations" was widely used by human rights organs and bodies. In principle, all violations of human rights should give rise to reparation. Therefore, he had no difficulty with deleting the word "gross". At the same time, he pointed out that the Commission on Human Rights and the Sub-Commission in particular often expressed their concern over the substantial damage and acute suffering caused to individuals, groups and communities as a result of "gross" violations of human rights and fundamental freedoms.

27. He agreed to replace the term "humanitarian law" by "international humanitarian law". As to the issue of the interrelationship between international and domestic law raised by Mr. Alfonso Martínez and Mr. Zhong, he agreed that he could make some accommodations in the text and delete, in particular, in principle 7 the words "In accordance with international law". He noted Mr. Zhong's statement that reparation should be provided in accordance with the law of the State concerned. However, while he was researching his study he discovered that only a few States had adequate provisions to that effect and the legislation of many States did not provide any redress in that field. As to the provision contained in the second sentence of principle 3, stating that "In the event international and national norms differ, the State shall ensure that the norm providing the higher degree of protection shall be applicable", he pointed out that the principle was

taken from article 5, paragraph 2, of the International Covenant on Civil and Political Rights. The principle was also included in American and European conventions on human rights. However, the wording of this provision could be improved to reflect more precisely the relevant provisions of the international instruments referred to.

28. With reference to the right of access to international procedures, Mr. van Boven stated that States had a duty not to prevent access to persons who were entitled under international instruments to utilized those procedures. The notion of and term "universal jurisdiction" contained in principle 5 related to crimes under international law, namely crimes of genocide, crimes against humanity and war crimes. Relevant instruments provided for universal jurisdiction. He supported the idea of collective rights embodied in principle 6. In that connection, Mr. van Boven referred to the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, in paragraphs 1 and 2 of which "victims" meant persons who, individually or collectively, had suffered damage.

29. Mr. van Boven acknowledged that the issue of statutes of limitations was a sensitive one. However, he had included it in principle 9, trying to word a compromise provision stating that statutes of limitations shall not apply in respect of periods during which no effective remedies existed for violations of human rights and humanitarian law. The second sentence of principle 9 also contained a more limited provision than in the original draft.

30. As to the objection by Mr. Alfonso Martínez to undue emphasis on the notion of international law, Mr. van Boven considered that in certain instances references to it should be retained where they were functional but in some places, like principle 7, the reference to international law could be deleted. As to the prosecution of offenders, he was in favour of prosecuting the perpetrators of very serious crimes. However, it was the duty of the State and the public authorities to prosecute offenders and not a right of the victim, as the Human Rights Committee had stated in its case law. In principle 15 (e) of the draft, by stating that "judicial or administrative sanctions against persons responsible for the violations" shall be provided, the matter was treated as a form of satisfaction.

31. Members of the working group pointed out that in 1994 and 1995 it had considered in detail the draft principles and guidelines, on the basis of which the revised set of draft principles and guidelines was submitted. In the opinion of the group, Mr. van Boven had taken into account many of the observations and remarks made by members of the group. The working group commended Mr. van Boven for the excellent work performed.

32. The working group and the Special Rapporteur expressed the hope that, in the light of the intention conveyed in Sub-Commission decision 1995/117 as well as in Commission on Human Rights resolution 1996/35, the Sub-Commission would be able to transmit the revised set of basic principles and guidelines, together with the comments and suggestions contained in the present report, to the Commission on Human Rights at its fifty-third session.

II. ISSUES RELATED TO THE DEPRIVATION OF THE RIGHT TO LIFE, WITH SPECIAL REFERENCE TO: (a) IMPOSITION OF THE DEATH PENALTY ON PERSONS OF LESS THAN 18 YEARS OF AGE AND ON THE MENTALLY AND PHYSICALLY DISABLED; (b) SUMMARY, ARBITRARY AND EXTRAJUDICIAL EXECUTIONS

33. In response to a request by the working group at the forty-seventh session of the Sub-Commission, Mr. El-Hadji Guissé submitted a follow-up report on the evolution of capital punishment. He focused particularly on progress towards de jure and de facto abolition of the death penalty. He also emphasized that the systems of punishment of 97 States still included the death penalty 1/ and that it was imposed extrajudicially, particularly in the form of summary executions and enforced disappearances. The death penalty was imposed indiscriminately on vulnerable groups, including minors, pregnant women, mothers of young children, the mentally ill, the mentally disabled and older persons. Finally, he described steps taken to encourage the abolition of the death penalty both at the national level (national legislative and statutory guarantees of the right to a fair trial) and within the framework of the United Nations.

34. The Chairman-Rapporteur of the working group, speaking on behalf of his colleagues, congratulated Mr. Guissé and thanked him for his excellent report. Mr. Guissé agreed to submit a follow-up report on this important matter at the next session.

III. FOLLOW-UP MEASURES TO THE DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

35. Introducing agenda item 3, the representative of the Centre for Human Rights recalled that, at the forty-seventh session of the Sub-Commission, the working group had asked Mr. Louis Joinet to submit, at the forty-eighth session, a preliminary draft "international convention on the prevention and punishment of enforced disappearances". That draft (E/CN.4/Sub.2/1996/WG.1/CRP.2) was now before the group for its consideration.

36. In his introductory remarks, Mr. Joinet first recalled that, since 1975, the Sub-Commission had been concerned by the tragedy of enforced disappearances, a practice which had become widespread in Argentina after the military coup d'état of 1976. In view of the existence of such practices in many parts of the world, the Commission on Human Rights, alerted by the Sub-Commission, had finally decided to establish, within the framework of the special procedures, the Working Group on Enforced or Involuntary Disappearances (resolution 20 (XXXVI) of 29 February 1980), the mandate of which had been continuously extended since then.

37. In view of the persistence of such practices, the Sub-Commission had subsequently asked the sessional working group on the administration of justice to consider a draft declaration on the question. After being submitted to the Sub-Commission, the Commission on Human Rights and

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1/ As of January 1995, according to information provided by Amnesty International.

the Economic and Social Council, the draft had been adopted by the General Assembly in its resolution 47/133 of 18 December 1992, entitled "Declaration on the Protection of All Persons from Enforced Disappearance".

38. Mr. Joinet, Rapporteur, said that while the Declaration had been his primary inspiration in preparing the preliminary draft convention, he had also taken the following into consideration:

(a) The Inter-American Convention on Forced Disappearance of Persons, adopted by the Organization of American States (OAS) in June 1994;

(b) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 10 December 1984;

(c) The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly on 26 November 1968;

(d) The Code of Conduct for Law Enforcement Officials, adopted by the General Assembly on 17 December 1979.

39. After an article-by-article presentation of the text, he said that the working group had a choice of methods in considering the preliminary draft:

(a) Either the working group could proceed on an article-by-article basis;

(b) Or it could conduct a general debate which would allow the participants to give their preliminary views on the general approach of the preliminary draft and on matters of principle which should be studied in greater depth.

40. The working group decided on the second method and launched into a broad-ranging discussion. It focused primarily on the following points, which, for the sake of clarity, have been arranged under three headings: drafting questions, substantive issues and follow-up to consideration of the preliminary draft.

A. Drafting questions

41. Several speakers said the preliminary draft seemed too detailed, which gave it a style which was not quite that of a convention (Mr. Zhong).

42. The opinion was expressed that the language needed to be tightened up by reorganizing some questions (Mr. Guissé) and, in some cases (for example, arts. 11 and 12), by splitting up articles that were too long (Mr. Zhong).

43. The working group endorsed those views.

44. It was also suggested that the title of the preliminary draft should be modified to make it clear that the convention in question was an "international" one and that the various articles should be grouped under

the following four headings: prevention, promotion, sanction and reparation (Mr. Park). The Rapporteur argued that, in order to facilitate adoption of the text by higher bodies, it would doubtless be better to keep the title and structure in their current form, which was based on that of the above-mentioned Declaration, adopted by the General Assembly in 1992.

45. It became clear during the discussion that there were some differences in translation between the Spanish and, in particular, the English versions and that of the original French (Ms. Gwanmesia). That point would be taken into consideration in the revised version.

B. Substantive issues

46. Comment focused essentially on matters of principle raised by the following articles:

Part One

Article 1 on the definition of forced disappearance: Several participants felt that, in view of the scale of this phenomenon in an ever-increasing number of countries, the definition, and also article 18, should include disappearances perpetrated by certain private entities or by organized groups acting altogether independently, without even an indirect link to the State (Mr. Zhong, Mr. Diaz Uribe). Other participants said that, while they understood the gravity of these situations, they had reservations in principle (Mr. Alfonso Martínez), particularly since such a course might weaken the State's mandate to ensure security of person. In that regard, it was noted that the State's obligation to compensate victims applied to all categories of victims, regardless of who was responsible for the violations (Mr. Diaz Uribe). In conclusion, the Rapporteur suggested that, in view of the differing opinions on that issue, the revised version of the text should include one or more alternatives so as to enable the group to take a fully informed decision.

Article 4, paragraph (1), subparagraph (d): Mr. Yokota suggested adding the names of United Nations specialized agencies and regional institutions to the subparagraph. Mr. Joinet suggested using, instead, the term "international cooperation".

Article 10, paragraph 2, which states that "no privileges, immunities or special exemptions shall be admitted in such trials": Mr. Yokota said he wondered whether that reference, which was taken from the Vienna Convention, was relevant. The Rapporteur promised to take that comment into account in the revised version by reproducing the wording of the Declaration, article 16, paragraph 3, of which specified that that restriction applied "without prejudice to the provisions contained in the Vienna Convention on Diplomatic Relations".

Article 17 on pardon: The Rapporteur suggested that the article should be reworded so that it could not be interpreted as excluding all possibility of pardon on humanitarian grounds until the detained person had been convicted, which implied that pardon was possible only after conviction. In principle, pardons were granted on humanitarian grounds only for medical

reasons, when the prisoner was in the terminal stage of a serious illness such as cancer or Acquired Immunodeficiency Syndrome (AIDS), a fact unrelated to his criminal status.

Article 18 on the appropriation of children of persons subjected to forced disappearance: It was asked whether this article should not be deleted since many other instruments dealt with the question (Mr. Park). The working group's attention was also drawn to the complexity of the issue (Mr. Zhong), particularly in view of the differences in the relevant national laws and in criteria for determining the best interests of the child, which varied from culture to culture (Ms. Gwanmesia, Mr. Guissé). The Rapporteur explained that, while the proposed wording was similar to that of article 18 of the Declaration, he would contact the Committee on the Rights of the Child in order to draw on its experience and to ensure that the article did not duplicate the provisions of other instruments.

Article 21 on officials who are authorized to order measures for the deprivation of liberty: It was pointed out that this article should take account of the specificity of the various national legal systems (Mr. Zhong). In general, reservations were expressed regarding any provision which explicitly stated that international law took precedence over national law (Mr. Alfonso Martínez). However, the Rapporteur later noted that it was in the nature of a convention to induce States parties to take account, in their laws, of the norms proposed by that convention but that, in order to take into account the specificities of national legal systems, Part Three of the draft would include the possibility of formulating reservations to certain articles at the time of accession. In that spirit, he had deleted from an earlier version the words, "States parties have the obligation under international law ...", keeping only the words commonly used in conventions: "The States parties to the present Convention undertake ...".

Article 24, paragraph 2, on the right of victims to reparation: It was suggested that rehabilitation should also be mentioned (Mr. Guissé). The Rapporteur explained that that had in fact been the reason for adding the reference to "the restoration of the honour and reputation" of the victim as part of the right to reparation.

Article 24, paragraph 4: It would be necessary to verify whether this article, devoted to the civil liability of States, presented a problem of coordination with the provisions of the Geneva Conventions, particularly Additional Protocol II, which dealt with the question (Mr. Guissé). The Rapporteur said he would contact the International Committee of the Red Cross (ICRC) in order to arrive at appropriate wording.

Part Two

47. There was a lengthy debate on the question of whether (Mr. Weissbrodt) the convention should be provided with a monitoring mechanism or whether this function should be vested in the Working Group on Enforced or Involuntary Disappearances (Mr. Alfonso Martínez and Mr. Chernichenko). The Rapporteur said that, in view of the importance of the question, he had preferred to ascertain the opinion of the working group before proposing a text. Consideration of the matter was postponed until the 1997 session.

Part Three

48. The working group did not have time to discuss this part. The only remark made was that the question of how many accessions should be required for the convention to enter into force should be left open (Mr. Alfonso Martínez and Mr. Zhong).

C. Follow-up to consideration of the preliminary draft

49. At the end of its session, the working group took the following decisions:

(a) In view of the technical nature of the text and the insufficient time available to the participants in the working group, the Rapporteur was asked to make any contacts which would facilitate study of the conditions under which the Centre for Human Rights could organize, an inter-sessional meeting of experts which would include the participation of members of the working group. The hope was expressed that Mr. Alfonso Martínez and Mr. Weissbrodt would take part in that meeting. If that proved impossible, the Rapporteur would contact Governments and non-governmental organizations (NGOs) with a view to examining possible ways of raising the funds needed to organize such a meeting. On that occasion, the group of experts would conduct a drafting review of the text on an article-by-article basis while attempting, to the extent possible, to avoid straying from the wording of the Declaration, inasmuch as it had already been approved by the General Assembly, except where new ideas were being introduced - particularly in order to take account of changes in the situation since the adoption of the Declaration in 1992;

(b) The Rapporteur would review the English and Spanish versions in order to bring them into line with the French original;

(c) The Rapporteur would endeavour to provide alternate texts for some articles in cases where differences of opinion emerged on matters of principle and, in general and time permitting, to prepare a report to be submitted along with the preliminary draft;

(d) The Secretariat would make available to the members of the working group at its next session, in the working languages, copies of the above-mentioned Declaration and the Inter-American Convention on Forced Disappearance of Persons.

IV. HABEAS CORPUS AS A NON-DEROGABLE RIGHT AND AS ONE OF THE REQUIREMENTS FOR THE RIGHT TO A FAIR TRIAL

50. In introducing the topic, the Chairman-Rapporteur recalled that the Sub-Commission had considered the question on several occasions since Ms. Nicole Questiaux, then Special Rapporteur on States of Emergency, had included it in her final study (E/CN.4/Sub.2/1982/15). The previous year, the working group had expressed the hope that Mr. Leandro Despouy, in updating his

annual report on human rights and states of emergency, would prepare a working document on that topic for the group. That document appeared in Part I of Mr. Despouy's annual report (E/CN.4/Sub.2/1996/19). The Chairman-Rapporteur said he was pleased by the quality of Mr. Despouy's work and suggested that, since the question had now been studied in sufficient depth, the working group might decide to make a concrete suggestion to the Sub-Commission in the form of a brief working document designed to take the form of a resolution or a decision when it was submitted to the Sub-Commission.

51. Ms. Gwanmesia said that, since habeas corpus was applied most frequently in Anglo-Saxon legal systems, it would be appropriate to ask Mr. Weissbrodt to prepare such a document. The working group endorsed that suggestion and Mr. Weissbrodt agreed to present the document next year.

52. Later, the Chairman-Rapporteur, with the support of Mr. Weissbrodt, pointed out that there were different forms of habeas corpus in other legal systems. Such was the case, for example, of the recurso de amparo, which existed in a very large number of Latin American countries and was broader in scope than habeas corpus. It was, therefore, deemed appropriate for Mr. Weissbrodt to consult Mr. Fix Zamudio, the Sub-Commission's Mexican expert and a specialist on the matter, with the latter's agreement.

V. ADVISABILITY OF MAINTAINING THE AGENDA ITEM ON JUVENILE JUSTICE

53. Mr. Joinet pointed out that a large number of initiatives had already been taken by the Sub-Commission in the field of juvenile justice, and recalled the report on the application of international standards concerning the human rights of detained juveniles prepared by Mrs. M.C. Bautista. He also referred to the report of the expert group meeting on children and juveniles in detention: application of human rights standards (E/CN.4/1995/100), held in Vienna from 30 October to 4 November 1994. He further stressed that several United Nations bodies, including the Commission on Human Rights, the Sub-Commission and the Committee on the Rights of the Child, had expressed their serious concern about the situation of children deprived of their liberty. He drew attention to document E/CN.4/Sub.2/1996/CRP.1, prepared at his request by the secretariat, recapitulating the reports, studies and other documents submitted by United Nations bodies since Mrs. Bautista's final report. Mr. Joinet suggested that, in view of the importance of this work and the overly-full agenda of the working group, the item should be deleted or, in any case, given a lower priority than the item on improving the Convention on the Prevention and Punishment of the Crime of Genocide.

54. Mr. Guissé emphasized the importance of juvenile justice in particular because of the vulnerability of minors, and stated that the subject should not be ignored.

55. The working group decided to retain this item provisionally on the agenda for its 1997 session and requested Ms. Gwanmesia to prepare a working paper on the subject.

VI. MEASURES TO BE TAKEN TO GIVE FULL EFFECT TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

56. The working group did not have time to consider this item. However, in the light of the conclusions and recommendations of the specific studies made by Mr. Nicomède Ruhashyankiko, entitled "Study on the question of the prevention and punishment of the crime of genocide" (E/CN.4/Sub.2/416) and of Mr. Benjamin Whitaker, entitled "Study on the question of the prevention and punishment of the crime of genocide" (E/CN.4/Sub.2/1985/6), it decided to include it in its agenda for the 1997 session in order to prepare, for consideration by the Sub-Commission, concrete proposals for the effective implementation of the Convention on the Prevention and Punishment of the Crime of Genocide.

VII. PROVISIONAL AGENDA FOR THE NEXT SESSION

57. At its 2nd meeting, the Working Group adopted the following provisional agenda for its next session:

1. Election of officers.

2. Adoption of the agenda.

3. Follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance.

4. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

   (b) Summary, arbitrary and extrajudicial executions.

5. Habeas corpus as a non-derogable right [and as one of the requirements for the right to a fair trial]

6. Measures to be taken to give full effect to the Convention on the Prevention and Punishment of the Crime of Genocide.

7. Juvenile justice.

8. Provisional agenda for the next session.

9. Adoption of the report of the working group to the Sub-Commission.

VIII. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

58. At its 3rd meeting, on 13 August 1996, the working group unanimously adopted the present report to the Sub-Commission.